

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

12 FORTINET, INC.,) Case No.: C 09-0036 RMW (PVT)
13 Plaintiff,)
14 v.)
15 PALO ALTO NETWORKS, INC., et al.,)
16 Defendants.)

**ORDER RE PARTIES' PROPOSED FORM OF
PROTECTIVE ORDER**

18 On December 15, 2009, the parties filed a [Proposed] Stipulated Protective Order. As
19 drafted, the proposed form of order is not acceptable to the court.¹ Based on the form of order
20 submitted,

IT IS HEREBY ORDERED that no later than January 8, 2010, the parties shall submit a revised form of order that tracks the language of the court's model form of protective order, with the

1 following modifications:

2 1.) The parties may include in the protective order the procedures set forth in Paragraph 5
3 of their proposed form of order regarding the handling of computer source code and
4 other hardware descriptive language ("Source Code"), provided that the provision
must make clear that only such Source Code that warrants protection under Federal
Rules of Civil Procedure 26(c) is covered; and
5
6 2.) The parties may include a provision to govern the inadvertent disclosure of privileged
or work product information that reads as follows:

7 "Each party shall make efforts that are 'reasonably designed' to protect
8 its privileged materials. *See Gomez v. Vernon*, 255 F.3d 1118, 1131-32 (9th
9 Cir. 2001). What constitutes efforts that are reasonably designed to protect
10 privileged materials depends on the circumstances; the law does not require
11 'strenuous or Herculean efforts,' just 'reasonable efforts.' *See, e.g., Hynix
12 Semiconductor, Inc. v. Rambus, Inc.* 2008 WL 350641, *1-*2 (ND Cal., Feb.
13 2, 2008); *see also*, FED.R.CIV.PRO. 26(f)(3) advisory committee's notes to
14 2006 amendments (discussing the substantial costs and delays that can result
from attempts to avoid waiving privilege, particularly when discovery of
15 electronic information is involved). When a particular Rule 34 request
16 requires a production or inspection that is too voluminous, expedited or
17 complex (such as certain electronic productions) to allow for an adequate pre-
18 production review, the parties may enter into non-waiver agreements for that
19 particular production. If the requesting party is unwilling to enter into such an
20 agreement, the Producing Party may move the court for a non-waiver order.

21 "In the event that, despite reasonable efforts, a Producing Party
22 discovers it has inadvertently produced privileged materials, then within 30
23 calendar days the Producing party shall notify the Receiving Party that the
24 document(s) or materials should have been withheld on grounds of privilege.
25 After the Receiving Party receives this notice from the Producing Party under
26 this paragraph, the Receiving Party shall not disclose or release the
27 inadvertently produced material to any person or entity pending resolution of
28 the Producing Party's claim of privilege. The parties shall hold a meet and
confer, as defined in Civil Local Rule 1-5(n), as soon as reasonably possible
after a notice of inadvertent production. If the Producing Party and Receiving
Party agree that the inadvertently produced material is privileged, and was
disclosed despite efforts by the Producing Party that were 'reasonably
designed' to protect the materials, then the Receiving Party shall return or
certify the destruction of all copies (including summaries) of such material. If
no agreement is reached, then within 10 court days after the meet and confer,
the Producing Party must seek a ruling from this court to establish that the
material is privileged and that the Producing Party did not waive the privilege
by inadvertently producing the material. If the Producing Party seeks such a
ruling, the Receiving Party shall not disclose or release the inadvertently
produced material to any person or entity pending the court's ruling on the
Producing Party's motion."

29 IT IS FURTHER ORDERED that, pending entry of the final form of protective order, the
30 court's model form of protective order, as modified herein, shall govern the handling of confidential
31 information exchanged or disclosed during discovery in this case.

32 IT IS FURTHER ORDERED that, in the event the parties want any other modifications to

1 the court's model form of protective order, they shall file a joint statement setting forth the reason(s)
2 for the requested modification(s).

3 Dated: 12/18/09

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5 PATRICIA V. TRUMBULL
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